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UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,
PETITIONERS

v.

VINCENT JAMES LANDANO

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONERS

KENNETH W. STARR
Solicitor General

[redacted]
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

[redacted]
Assistant to the Solicitor General

LEONARD SCHAITMAN
[redacted]
Attorneys

Department of Justice
[redacted]

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QUESTION PRESENTED

Exemption 7(D) of the Freedom of Information Act, 5 U.S.C. 552(b)(7)(D), permits withholding of law enforcement information that "could reasonably be expected to disclose the identity of a confidential source" and, in a criminal investigation, information provided by such a source. The question presented is:

Whether, in light of the confidentiality that is inherent whenever the FBI gathers information during a criminal investigation, Exemption 7(D) protects all sources of such information, in the absence of record evidence negating the premise of confidentiality for a particular source.

PARTIES TO THE PROCEEDING

Petitioners, the defendants below, are the United States Department of Justice and the Federal Bureau of Investigation. Respondent, the plaintiff below, is Vincent James Landano.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-2054

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 956 F.2d 422. The opinions of the district court (Pet. App. 31a-47a, 48a-61a) are reported at 751 F. Supp. 502 and 758 F. Supp. 1021, respectively.

JURISDICTION

The judgment of the court of appeals was entered on February 11, 1992. A petition for rehearing was denied on April 14, 1992. Pet. App. 62a-63a. The petition for a writ of certiorari was filed on June 22, 1992, and was granted on October 5, 1992. J.A. 45. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

The Freedom of Information Act (FOIA), 5 U.S.C. 552, provides in pertinent part:

> (b) This section does not apply to matters that are—
>
> * * * * *
>
> (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information * * * (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source * * *.

STATEMENT

1. Respondent was convicted in New Jersey state court for the 1976 murder of John Snow, a New Jersey police officer. In September 1988 and January 1989, respondent filed requests with the Federal Bureau of Investigation (FBI) under the Freedom of Information Act (FOIA), 5 U.S.C. 552, for information that the FBI had compiled in the course of its involvement in the investigation.[1]

[1] Although the investigation was principally a state matter, the FBI became involved in part because of the need for interstate "unlawful flight" warrants to apprehend certain suspects. Respondent has insisted that Victor Forni was the actual killer and that New Jersey officials withheld exculpatory evidence, in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963). Respondent's initial efforts to obtain habeas corpus relief in state and federal court were unsuccessful. *Landano* v. *Rafferty*, 670 F. Supp. 570 (D.N.J. 1987), aff'd, 856 F.2d 569 (3d Cir. 1988), cert. denied, 489 U.S. 1014 (1989). The federal district court subsequently granted relief,

In May 1990, the FBI released several hundred pages of documents, some of which contained redactions, and withheld several hundred other pages in their entirety. Material was withheld principally on the basis of FOIA Exemptions 6 and 7(C), 5 U.S.C. 552(b)(6) and (7)(C), which protect against unwarranted invasions of personal privacy, and Exemption 7(D), 5 U.S.C. 552(b)(7)(D), which protects confidential sources of law enforcement information.[2]

Respondent filed the present action in May 1990. J.A. 1; see Amended Complaint (J.A. 9-13). In support of their motion for summary judgment, the Department of Justice and the FBI (hereafter the FBI) submitted the declaration of Special Agent Regina M. Superneau, J.A. 18-42, which described the FBI's search for the requested

based upon allegations of newly discovered evidence; that ruling, however, was reversed because of respondent's failure to exhaust state remedies. *Landano* v. *Rafferty*, 126 F.R.D. 627 (D.N.J. 1989), rev'd, 897 F.2d 661 (3d Cir.), cert. denied, 111 S. Ct. 46 (1990). Respondent is now pursuing those issues in the New Jersey courts. See Pet. App. 2a. Meanwhile, the court of appeals recently reversed an order of the district court in which it had taken the extraordinary step of ordering respondent's release on federal bail pending conclusion of those state proceedings. *Landano* v. *Rafferty*, 782 F. Supp. 986 (D.N.J.), rev'd, 970 F.2d 1230 (3d Cir. 1992), cert. denied, No. 92-436 (Nov. 2, 1992).

[2] The records released in May 1990 related to respondent's first and principal request, which was for all records concerning the investigation of Officer Snow's murder. Respondent's second FOIA request—for records specifically concerning Forni—was initially denied in its entirety under Exemption 7(C), because release of any such records would have been an unwarranted invasion of Forni's privacy. Forni subsequently consented to disclosure, and the FBI then reprocessed the second request without regard to Forni's privacy interests, but withheld portions of the requested records based on the same considerations under Exemptions 7(C) and 7(D) that the FBI invoked with respect to the principal request. The Exemption 7(D) rulings of the courts below related to both sets of records. Pet. App. 51a-52a.

records and the reasons for withholding various portions of them. The declaration discussed in detail the FBI's rationale for invoking a particular exemption for each category of information and assigned a code to each category. The same codes were then used to indicate, on a set of redacted documents, the reasons for each withholding. *Id.*, ¶¶ 17-20 (J.A. 26); see Pet. App. 37a-38a. For example, category "(b)(7)(D)-(3)" referred to individuals who provided information under implied or express promises of confidentiality, and to information provided by such persons. *Id.*, ¶¶ 24, 47-52 (J.A. 28, 37-40). The declaration also described in detail the FBI's need for cooperation by such persons, the inherent dangers they would confront if their identities or the information provided by them were released to the public, and the implicit assurances of confidentiality present whenever the FBI interviews individuals in the course of a criminal investigation. *Ibid.* Other categories of material for which the FBI invoked Exemption 7(D) included internal FBI source symbols for especially sensitive informants, identities of and information provided by informants who provided information to the FBI on a continuing basis, identities of and information provided by local law enforcement agencies, and identities of and information provided by financial or commercial institutions. *Id.*, ¶¶ 42-45, 53-56 (J.A. 33-37, 40-41); see Pet. App. 19a-20a.[3]

2. In a decision dated November 29, 1990, the district court sustained some of the FBI's withholdings, but

[3] Because respondent's second FOIA request had at that point been denied in its entirety on other grounds (see note 2, *supra*), the Superneau Declaration did not address the documents responsive to that request. The same issues arise with respect to those documents, however, and the district court extended its initial ruling to them without calling for a further FBI declaration. See Order of Dec. 13, 1990 (J.A. 43-44). The court of appeals in turn affirmed the district court's Exemption 7(D) rulings in their entirety. See Pet. App. 30a.

rejected many of its pivotal arguments under Exemptions 7(C) and 7(D). Pet. App. 31a-47a. With respect to Exemption 7(D), at issue here, the court held that the FBI's categorical explanations sufficed for certain witnesses and what it referred to as "undercover agents," but that for "all other information withheld by [the FBI] under [Exemption] (b)(7)(D), the court requires case-specific reasons for non-disclosure which were not supplied by [the FBI]." Pet. App. 45a.[4]

In response to the FBI's motion for reconsideration, the court reaffirmed its ruling and further explained its reasoning. Pet. App. 48a-61a. Citing the Third Circuit's ruling in *Lame* v. *United States Dep't of Justice*, 654 F.2d 917 (3d Cir. 1981), the district court held that the FBI must make a particularized showing regarding the circumstances of each individual source for which it invokes Exemption 7(D). It accordingly rejected the proposition that promises of confidentiality are "inherently implicit" whenever the FBI collects information in the course of a criminal investigation. Pet. App. 52a-55a.

3. A panel of the court of appeals affirmed in part and reversed in part. Pet. App. 1a-30a. On the issue of invasion of personal privacy under Exemption 7(C), the court of appeals joined several other courts in recognizing that persons whose names appear in criminal law enforcement records necessarily have a significant privacy interest regarding the release of such information. *Id.* at 6a-7a. It also held that, under *United States Dep't of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), and *United States Dep't of State* v. *Ray*, 112 S. Ct. 541 (1991), there is no cognizable "public interest" in the disclosure of the records that the FBI withheld under Exemption 7(C), because there is no indication that they would reveal anything about the

[4] The court declined to conduct an *in camera* inspection of the documents themselves. Pet. App. 45a-46a.

workings of the FBI. The court of appeals accordingly reversed the district court's judgment insofar as it ordered release of information the FBI had withheld under Exemption 7(C). Pet. App. 9a-17a.

By contrast, the panel affirmed the district court's judgment insofar as it required release of information the FBI withheld under Exemption 7(D). Pet. App. 17a-30a. The panel recognized that Exemption 7(D) applies to all "confidential" sources, without resort to any balancing of interests. *Id.* at 18a. This principle, the panel noted, reflects the purpose of Exemption 7(D) "to protect the ability of law enforcement agencies to obtain the cooperation of persons with relevant information." *Ibid.* The panel also recited the legislative history stating that Exemption 7(D) applies broadly to "citizen volunteer[s]," including both those expressly assured of confidentiality and those who provided information "in circumstances from which such an assurance could reasonably be inferred." *Id.* at 21a, 22a (quoting S. Rep. No. 1200, 93d Cong., 2d Sess. 13 (1974)). And the panel recognized that the 1986 amendments to the FOIA—which permit an agency to withhold information that "could reasonably be expected to" disclose (rather than "would" disclose) the identity of a confidential source or information furnished by such a source in a criminal investigation—were intended to "lighten the agency's burden in invoking Exemption 7." *Id.* at 23a (citing *Reporters Committee*, 489 U.S. at 756 n.9).

The panel nevertheless rejected the FBI's submission that, in light of the sensitive nature of FBI criminal investigations, the very fact that a person furnished information to the FBI in the course of such an investigation is sufficient (in the absence of contrary evidence) to support an inference of confidentiality, and therefore to permit withholding under Exemption 7(D). While acknowledging conflicting decisions in a number of other circuits and characterizing the question as "difficult,"

Pet. App. 21a-22a, the panel deemed itself bound by the Third Circuit's prior decision in *Lame*, which it read to require "a showing by the government of the particular circumstances of an interview or source." *Id.* at 28a. The panel rejected the FBI's argument that *Lame*'s rationale had been superseded by *Reporters Committee*'s approval of a categorical approach to withholding under Exemption 7, and by the 1986 FOIA amendments' lessening of the government's burden under that exemption. *Id.* at 28a-29a.

4. Because of the importance of Exemption 7(D) in protecting confidential sources and ensuring the continued flow of law enforcement information—and in light of the panel's acknowledgement that its approach diverged from that of other courts of appeals—the FBI filed a petition for rehearing with suggestion of rehearing en banc, so that the full court of appeals could reconsider *Lame*. The court of appeals denied rehearing, even though a majority of the active judges voting (including Judge Stapleton, the author of the panel opinion) voted to rehear the case en banc. Pet. App. 62a-63a; see Pet. 7 & n.4.[5]

SUMMARY OF ARGUMENT

The Federal Bureau of Investigation properly withheld the documents at issue in this case under Exemption 7(D) of the Freedom of Information Act, which protects "confidential sources" and information furnished by such sources in a criminal investigation. 5 U.S.C. 552(b)(7)(D). The vast majority of the courts of appeals that have addressed the issue have correctly held that the FBI may sustain withholding under this Exemption by establishing (as it did here) that the source furnished in-

[5] When the Court granted our certiorari petition on the Exemption 7(D) issue, it denied respondent's cross-petition challenging the Third Circuit's ruling on Exemption 7(C). *Landano* v. *United States Dep't of Justice*, cert. denied, No. 92-161 (Oct. 5, 1992).

formation in the course of a criminal investigation, because confidentiality is inherent in the very nature of an FBI interview in that setting.

A. The contrary ruling by the court of appeals in this case—that the FBI must support its invocation of Exemption 7(D) with "detailed explanations relating to each confidential source," Pet. App. 27a—imposes an evidentiary burden that appears nowhere in the text of FOIA itself. The courts of appeals (including the court below) have uniformly held that the FBI may invoke Exemption 7(D) not only where there was an express assurance of confidentiality, but also on the basis of circumstances from which such an assurance "could reasonably be inferred." An inference of confidentiality is compelled in the present context because sources who furnish information to the FBI in the course of a criminal investigation are almost invariably "confidential," both in the sense that their roles in the investigation are not widely known and in the sense that they furnish information "in confidence"—*i.e.*, "within a relation or state of trust or intimacy." *Webster's Third New International Dictionary* 476 (1986).

In this case, the FBI submitted a declaration describing the reasons an assurance of confidentiality could reasonably be inferred with respect to each category of sources who furnished information. Because weighty liberty and property interests are at stake in FBI criminal investigations, disclosure of the identities of sources or the information they furnish would inevitably create a risk of adverse consequences. The FBI's ability to elicit cooperation has therefore depended in large part upon its traditional ability to maintain confidentiality. Accordingly, a showing that a particular source provided information in the course of a criminal investigation is sufficient (in the absence of evidence to the contrary in the particular case) to support an inference that the source was, in fact, "confidential."

It is especially appropriate to permit withholding on the basis of inferences drawn from such a showing in light of the 1986 amendments to Exemption 7(D), which require the FBI to show only that release of the records "could reasonably be expected to" disclose a confidential source or information furnished by such a source. As this Court recognized in *United States Dep't of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), that standard supports use of categorical or inferential approaches in applying Exemption 7.

B. A presumption of confidentiality for sources in criminal investigations also finds strong support at each stage of FOIA's statutory evolution. Beginning with the enactment of FOIA in 1966, Congress has evinced an abiding concern that the Act's policies of open government not be permitted to endanger the effectiveness of vital law enforcement activities or impede the continued flow of information to the FBI and other federal law enforcement agencies. Although the 1974 amendments to FOIA restructured Exemption 7 to make its coverage more well defined, they reaffirmed the Exemption's purpose to protect a broad range of confidential sources. Congress enacted those amendments with full awareness of the FBI's tradition of confidentiality, and the Conference Report makes clear that confidentiality may be inferred from the circumstances in which information was furnished.

The nature and legislative history of the 1986 amendments to FOIA further support a realistic presumption of confidentiality in order to ensure effective protection of FBI sources. Those amendments were enacted against the background of extensive testimony by federal law enforcement officials concerning the unwillingness of many potential sources to provide information because of their perception that FOIA prevented federal agencies from maintaining the confidentiality of their sources. Congress appreciated the gravity of the threat to effective law en-

forcement and intended to ease the burden of federal agencies in invoking Exemption 7.

C. The approach we urge is also consistent with the Court's repeated recognition of the need for "workable rules" under the FOIA and the need to ensure that its Exemptions are given "meaningful reach and application." See *Reporters Committee*, 489 U.S. at 779; *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 152 (1989). The court of appeals' requirement of source-specific factual showings in each instance of withholding under Exemption 7(D) is unworkable, because it would impose an enormous and unnecessary burden on federal agencies and federal courts. It also would effectively preclude protection for many confidential sources, because the passage of time and limited documentation would frequently make it impossible for the FBI to meet the standard the court has imposed. Moreover, to allow protection for confidential sources to depend upon *post hoc* judicial second-guessing of the circumstances of individual law enforcement encounters would render the protection of Exemption 7(D) unpredictable, thereby frustrating Congress's intent to preserve the flow of law enforcement information by reassuring potential sources of the FBI's ability to preserve their confidences.

D. The use of a presumption of confidentiality is fully consistent with FOIA's imposition of the burden of proof on the agency seeking to sustain the withholding of records. See 5 U.S.C. 552(a)(4)(B). An inference of confidentiality regarding FBI criminal investigations comports with the preponderance of the evidence standard used in civil litigation, because the FBI's demonstration that a source provided information in the course of such an investigation makes it more likely than not (in the absence of contrary evidence) that the source was in fact "confidential." Recognition of a presumption to this effect also accords with general principles regarding the use of presumptions, based upon probabilities, the difficulty of adducing direct proof, and the furtherance of relevant statutory policies. Finally, as the Federal Rules of Evidence and decisions of this Court make clear, recognition of such a presumption does not shift the ultimate burden of persuasion, which remains on the party (here the FBI) that has the underlying burden. At the same time, a presumption of confidentiality substantially furthers the purpose of Exemption 7(D) of promoting the flow of information upon which the FBI and other law enforcement agencies depend for their vital work.

ARGUMENT

THE FBI SATISFIED ITS BURDEN OF SUSTAINING THE WITHHOLDING OF THE REQUESTED DOCUMENTS UNDER EXEMPTION 7(D) OF THE FREEDOM OF INFORMATION ACT

Exemption 7(D) of the FOIA protects law enforcement information that "could reasonably be expected to disclose the identity of a confidential source" and, in the case of information compiled in a criminal investigation, "information furnished by a confidential source." The court of appeals, adhering to its prior ruling in *Lame* v. *United States Dep't of Justice*, 654 F.2d 917 (3d Cir. 1981), held that any invocation of this Exemption by the FBI must be supported by " 'detailed explanations relating to each alleged confidential source' "—"a showing by the government of the particular circumstances of an interview or source." Pet. App. 27a, 28a (quoting 654 F.2d at 928). This holding imposes upon the FBI an evidentiary burden that appears nowhere in the text of the FOIA and that is contrary to Exemption 7(D)'s purpose of securing maximum protection for the confidentiality of sources in criminal investigations.

In contrast to the Third Circuit, the vast majority of the courts of appeals that have addressed the issue have recognized that individualized, source-specific showings of the sort contemplated by the decision below and *Lame* are

unnecessary, because confidentiality is implicit in the very nature of an FBI interview conducted in the course of a criminal investigation. See *Parker* v. *Dep't of Justice*, 934 F.2d 375, 378 (D.C. Cir. 1991); *Dow Jones & Co.* v. *Department of Justice*, 917 F.2d 571, 575-577 (D.C. Cir. 1990); *Schmerler* v. *FBI*, 900 F.2d 333, 337 (D.C. Cir. 1990); *Donovan* v. *FBI*, 806 F.2d 55, 61 (2d Cir. 1986); *Diamond* v. *FBI*, 707 F.2d 75, 78 (2d Cir. 1983), cert. denied, 465 U.S. 1004 (1984); *Ingle* v. *Department of Justice*, 698 F.2d 259, 269 (6th Cir. 1983); *Miller* v. *Bell*, 661 F.2d 623, 627 (7th Cir. 1981), cert. denied, 456 U.S. 960 (1982); *Hale* v. *United States Dep't of Justice*, 973 F.2d 894, 899 (10th Cir. 1992); *Johnson* v. *United States Dep't of Justice*, 739 F.2d 1514, 1517-1518 (10th Cir. 1984); *Nadler* v. *United States Dep't of Justice*, 955 F.2d 1479, 1484-1487 (11th Cir. 1992); see also *Irons* v. *FBI*, 880 F.2d 1446, 1447 (1st Cir. 1989) (en banc) (dictum).[6] Under these decisions, a showing by the FBI that a source furnished information in the course of a criminal investigation is sufficient in itself to establish its prima facie case (or raise a presumption of confidentiality) under Exemption 7(D), thereby entitling the FBI to summary judgment unless the requester produces affirmative evidence that rebuts the inference of confidentiality in the particular case. The accumulated wisdom of these decisions respects the text and purposes of Exemption 7(D), the practicalities of FOIA administration and litigation, and the role of presumptions in our legal system.

[6] In *Wiener* v. *FBI*, 943 F.2d 972 (9th Cir. 1991), cert. denied, 112 S. Ct. 3013 (1992), the Ninth Circuit appeared to leave open the possibility of recognizing a "presumption" of confidentiality regarding FBI criminal investigations. *Id.* at 987 n.29. But the court nevertheless rejected the FBI's invocation of Exemption 7(D) on the ground that it had failed to provide in its *Vaughn* index (see *Vaughn* v. *Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974)) a description of "the facts and circumstances surrounding the receipt of information from informants." 943 F.2d at 987.

A. The FBI's Withholding Of The Documents Is Fully Consistent With The Text Of Exemption 7(D)

In applying the FOIA, as any federal statute, the Court's inquiry must begin with "the language of the statute itself." *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 153 (1989). Exemption 7(D) protects from mandatory disclosure "law enforcement information" that--

> could reasonably be expected to disclose [1] the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and [2], in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source * * *.

The FBI fully satisfied its burden under this exemption.

1. As an initial matter, the documents in question satisfy the general threshold requirement for protection under Exemption 7, because they were "compiled for law enforcement purposes." See Pet. App. 39a-40a; *John Doe Agency*, 493 U.S. at 148, 153-157. The documents also satisfy the specific threshold requirement for protection under the second clause of Exemption 7(D), because they were "compiled by criminal law enforcement authority [the FBI] in the course of a criminal investigation [the investigation of the murder of Officer Snow]." Superneau Decl. ¶¶ 12-14 (J.A. 23-24); Pet. App. 20a-21a & n.3.

Exemption 7(D) provides broad protection for such records insofar as they relate to "confidential sources." That protection is afforded not only to the identities of the "confidential sources" themselves, but also to any and all information they may have provided. Pet. App. 18a.

As a result, if the material was obtained in a criminal investigation, any given piece of information may be withheld if it could reasonably be expected to identify a confidential source, *or* if it could reasonably be expected to reveal any information provided by a confidential source. See *Ferguson* v. *FBI*, 957 F.2d 1059, 1069 (2d Cir. 1992); *Irons* v. *FBI*, 880 F.2d at 1448; *Shaw* v. *FBI*, 749 F.2d 58, 61 (D.C. Cir. 1984) (Scalia, J.). Furthermore, Exemption 7(D), unlike Exemption 7(C), does not permit a court to balance competing interests; it protects confidential sources and the information they furnished "no matter how strong the public interest in disclosure." Pet. App. 18a; see also *Hale*, 973 F.2d at 899; *Ferguson*, 957 F.2d at 1069; *Nadler*, 955 F.2d at 1487 n.8.

As the court below pointed out, this extra measure of security for criminal investigations "reflects the fact that the purpose of Exemption 7(D) is to protect the ability of law enforcement agencies to obtain the cooperation of persons with relevant information." Pet. App. 18a. It does so by eliminating any possibility that a confidential source might be identified indirectly through release to a knowledgeable requester of information that only that particular source could have furnished. See Superneau Decl. ¶ 50 (J.A. 38-39).[7] Nothing in Exemption 7(D)'s deliberately sweeping language suggests that the FBI must make a detailed showing regarding the circumstances of each interview or source in order to invoke the prophylactic protection the exemption affords.

[7] The breadth of Exemption 7(D) is also reflected in the key statutory term "confidential source." Congress's intention not to limit the exemption's coverage to the archetypal back-alley "informant" is demonstrated by its use of the all-encompassing term "source" (see also pages 26, 28, *infra*) and by its express inclusion of private institutions and state and local governments, as well as natural persons, among the "confidential sources" afforded protection.

2. The first clause of Exemption 7(D) permits withholding of information if its release "could reasonably be expected to disclose the identity of a confidential source," and the second clause permits withholding if release could reasonably be expected to disclose "information furnished by a confidential source" in a criminal investigation. Both clauses refer to the confidentiality of the *source*, not the interview or the information it yields. *Dow Jones*, 917 F.2d at 578. They therefore do not support the court of appeals' view (see Pet. App. 20a, 21a n.3, 24a, 26a) that the FBI was required to produce evidence concerning its interviews with each source.

Furthermore, under any of the ordinary meanings of the term "confidential" as used in Exemption 7(D), it is apparent that the FBI can make a proper showing of confidentiality without engaging in the sort of source-by-source description upon which the court below insisted. Under one reading of the term, a source is "confidential" if his identity as such is "known only to a limited few" and is "not publicly disseminated." *Webster's Third New International Dictionary* 476 (1986). Persons who furnish information to the FBI in criminal cases will almost invariably meet that test. Because the FBI's declaration established (and the courts below and respondent have not disputed) that the sources in this case furnished information in a criminal investigation—and because respondent produced no evidence showing that the identity of any source nevertheless *was* widely "known" or "publicly disseminated"—no particularized showing was needed to establish that the sources are "confidential" in that sense.

Alternatively, the word "confidential" may mean "communicated, conveyed, acted on, or practiced in confidence." *Webster's New Third International Dictionary* 476 (1986). This meaning of "confidential" fits especially well in the present context, because Exemption 7(D) focuses on the transmission of information to the FBI and other law

enforcement agencies by outside "sources."[8] A "confidential source" in this sense is one who transmits information to the agency "in confidence"—*i.e.*, "within a relation or state of trust or intimacy." See *Webster's Third New International Dictionary* 476 ("confidence," def. 6).[9] Exemption 7(D) itself furnishes textual support for this interpretation, because it includes among confidential sources those governmental and private institutions that have "furnished information on a confidential basis."

In applying Exemption 7(D)'s reference to "confidential sources," the courts have uniformly recognized that the trust or confidence at issue need not be based on express assurances of confidentiality by federal law enforcement officials. On the contrary, relying on the Conference Report on the 1974 amendments to Exemption 7, the courts have agreed with the court below that a source must be considered "confidential" if the source "provided information under an express assurance of confidentiality *or* in circumstances from which such an assurance could reasonably be inferred." Pet. App. 22a (quoting S. Conf. Rep. No. 1200, 93d Cong., 2d Sess. 13 (1974)) (emphasis added); see cases cited at page 12, *supra*; *Brant Construction Co.* v. *EPA*, 778 F.2d 1258, 1263 (7th Cir. 1985) (collecting cases).

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[8] "Confidential" may have this meaning regardless of whether it refers to information (see *Shaw* v. *FBI*, 749 F.2d at 61) or to sources of information. *Shaw* itself dealt with Exemption 7(D)'s former reference to "confidential information." Deletion of "confidential" in that phrase was one of several amendments that Congress made in 1986 in an effort to clarify and broaden the exemption and render its protections more secure. See pages 29-33, *infra*.

[9] See also *Radowich* v. *United States Attorney, Dist. of Maryland*, 658 F.2d 957, 959 (4th Cir. 1981) ("given in confidence" or "in trust"); *Keeney* v. *FBI*, 630 F.2d 114, 119 n.2 (2d Cir. 1980) ("reposing confidence or trust").

3. The remaining question, then, is under what circumstances it "could reasonably be inferred" that the source provided information to the FBI in confidence. Having erroneously decided to adhere to its holding in *Lame* that an individualized showing is required for each source, the court of appeals failed to resolve that issue directly. See Pet. App. 26a. The court nonetheless appreciated the common sense of such an inference, because, "[a]fter all, the FBI is generally known to involve itself only in significant criminal matters and this means that in any FBI investigation, there are likely to be persons who have motives for resenting those who cooperate with it." *Id.* at 25a. The record in this case confirms the common sense of such an inference and demonstrates that the FBI carried its burden of sustaining its withholding of the documents.

a. The declaration submitted by the FBI in the district court explained fully the FBI's reasons for treating the sources at issue as "confidential" under Exemption 7(D). See Superneau Decl. ¶¶ 42-55 (J.A. 33-41). Addressing sources by groups keyed to coded excisions in the documents, the declarant—the supervisory FBI agent responsible for processing this FOIA request—explained in detail the considerations that justified "confidential" status. First, she described the need for confidentiality with respect to the names and internal codes of "informants" from whom the FBI received information on a regular basis under express assurances of confidentiality. See *id.*, ¶¶ 43-46 (J.A. 34-37).[10] The declarant went on to address the situation of other individuals who provide information to the FBI in the course of criminal investiga-

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[10] The district court appears to have accepted this portion of the FBI's Exemption 7(D) claims, espousing a "presumption of confidentiality" regarding "undercover FBI agents or FBI informants." See Pet. App. 54a. In light of the express assurance of confidentiality for these informants, it is not apparent why the district court adverted to a "presumption."

tions. *Id.*, ¶¶ 47-52 (J.A. 47-52). Because cooperation by such individuals ordinarily is voluntary and the information they furnish is potentially quite harmful to persons who "may lose substantial liberty or property interests," any assistance they render to the FBI entails an inherent risk of reprisal, harassment, or public embarrassment. *Id.*, ¶ 49 (J.A. 37-38). "In order that the FBI's investigative responsibilities are not deterred, persons being interviewed must be assured, either expressly or implicitly, that the information received will be held in the strictest of confidence." *Id.*, ¶ 47 (J.A. 37); see also ¶ 49 (J.A. 37-38) ("Persons providing information * * * should be secure in the knowledge that, absent the necessity of * * * public testimony, with its attendant judicial restraints and protections, their assistance and their identities will be held in confidence. * * * These considerations have been met by the traditional willingness and ability of the FBI to assure persons interviewed that their identities would be protected."); note 13, *infra*.

b. As the court below acknowledged, the overwhelming majority of courts of appeals to have considered the question have recognized that such a showing by the FBI—based upon its long experience in eliciting the cooperation of potential witnesses and other sources and its traditional practices regarding confidentiality—amply supports an inference that a given source of information in a criminal investigation qualifies as "confidential," at least in the absence of specific evidence to the contrary. See Pet. App. 21a-22a (collecting cases), 30a; page 12, *supra*. In the seminal case of *Miller* v. *Bell*, the Seventh Circuit considered a similar showing on the FBI's part and readily concluded that the FBI had met its burden under 5 U.S.C. 552(a)(4)(B) to sustain the withholding. The court explained that "[u]nless there is evidence to the contrary in the record, we believe such promises of confidentiality are inherently implicit in FBI interviews conducted pursuant to a criminal investigation." 661

F.2d at 627. This judicial confirmation of "inherently implicit" confidentiality, in which numerous other courts have joined,[11] rests on a realistic appraisal of routine law enforcement practices and the legitimate expectations of persons willing to impart information to the FBI: "The FBI has a long-standing policy of treating as confidential all information obtained during the course of an investigation," *Nadler*, 955 F.2d at 1486; see *Londrigan* v. *FBI*, 722 F.2d 840, 843-844 (D.C. Cir. 1983), "and rarely—if ever—will a source not desire" that protection, *Dow Jones*, 917 F.2d at 577.[12] Sources who provide information to the FBI in these circumstances—be they individuals, private institutions, or state and local governmental entities[13]—accordingly have (and should continue to have)

[11] See *Parker*, 934 F.2d at 378; *Dow Jones*, 917 F.2d at 576; *Schmerler*, 900 F.2d at 337; *Keys*, 830 F.2d at 345; *Ingle*, 698 F.2d at 269; *Hale*, 973 F.2d at 899; *Johnson*, 739 F.2d at 1517-1518; *Nadler*, 955 F.2d at 1486; *Irons*, 880 F.2d at 1447 (dictum).

[12] Contrary to the suggestion below (Pet. App. 26a), these considerations also apply to seemingly "routine FBI interviews." It is difficult to anticipate all the ways in which release of criminal law enforcement information may prove harmful, and there is thus a strong basis for implied assurances of confidentiality even concerning the provision of "innocuous and favorable background and character information." *Dow Jones*, 917 F.2d at 576; *Schmerler*, 900 F.2d at 337-338. The present case—involving the murder of a police officer, with reports of gang involvement—vividly illustrates the sensitivity that often accompanies the very fact of cooperation with the FBI. See Pet. App. 25a-26a n.5. Furthermore, any suggestion that the applicability of Exemption 7(D) should hinge on an *ad hoc* evaluation of the sensitivity of the information would be contrary to the principle that "the availability of Exemption 7(D) depends not upon the factual contents of the document sought, but upon whether the *source* was confidential." *Shaw*, 749 F.2d at 61; see also *Schmerler*, 900 F.2d at 338.

[13] Although the reported decisions have discussed this issue principally with respect to individual sources, the assumption of confidentiality is every bit as strong in communications between law enforcement agencies. The FBI is particularly well positioned to

every reason to expect that the information will be maintained in confidence,[14] and not be made freely available to the public.[15]

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assess the "traditional understanding of confidentiality" that exists in that setting, and its judgment that release of information obtained from other agencies would "seriously jeopardize[]" the free exchange of information was unrebutted below. See Superneau Decl., ¶ 54 (J.A. 40); see also *Gordon* v. *Thornburgh*, 790 F. Supp. 374, 377-378 (D.R.I. 1992); *Hopkinson* v. *Shillinger*, 866 F.2d 1185, 1222 (10th Cir. 1989). The continued receipt of information from financial and commercial institutions and other private entities likewise depends on the FBI's tacit "assurance that their cooperation will not be publicly exposed," which could lead to retaliation in the form of lawsuits, loss of business, etc. Superneau Decl., ¶ 55 (J.A. 41).

[14] The court below speculated that an inference of confidentiality might not be warranted even under the approach we urge because the record "does not affirmatively reflect that the interviewees knew their interviewer was an FBI agent and knew the purpose for which the information was sought." Pet. App. 25a n.4. Such speculation was misplaced, because the identification of FBI agents as such is so well-known and routine a part of FBI interviews that the sort of recitations envisioned by the court would be superfluous. See FBI, *Manual of Investigative Operations and Guidelines, Manual No. 2815* (Jan. 31, 1978) (Section 7 (Interviews), item 7-1 (Use of Credentials for Identification): "Credentials (commissioner cards) shall be exhibited to all persons interviewed by Special Agents so there will be no doubt concerning the organization with which they are connected."). The courts may properly presume that FBI agents followed those instructions when they interviewed sources in the course of investigating the murder of Officer Snow. Cf. *United States Dep't of State* v. *Ray*, 112 S. Ct. 541, 550 (1991) (presumption of regularity).

[15] As the court of appeals correctly recognized, a source need not have an absolute expectation of confidentiality in order to qualify as a "confidential source" under Exemption 7(D). Pet. App. 24a-25a; see *Dow Jones*, 917 F.2d at 579 (Silberman, J., concurring in denial of rehearing en banc); Superneau Decl. ¶ 49 (J.A. 37-38). Various aspects of the criminal justice process—such as the need to share information with other investigative personnel, to reveal it to criminal defendants, or to introduce it at trial—will necessitate disclosure to some individuals. But those potentialities in no

Regardless of whether this rule is framed as a "presumption" (see *Dow Jones*, 917 F.2d at 579; *Hale*, 973 F.2d at 899; *Nadler*, 955 F.2d at 1486) or as the nature of the FBI's "prima facie case" (see Pet. App. 23a-24a), it is eminently sensible. Because confidentiality has long been assumed whenever the FBI obtains information from sources in the course of a criminal investigation, a showing by the FBI that a particular record relates to information provided in those circumstances is more than sufficient to support a reasonable inference—to make it more likely than not—that the source is a "confidential" one. To be sure, there may be instances in which the particular circumstances will demonstrate that the usual inference of confidentiality is not warranted, and decisions applying a "presumption" have consistently recognized that it may be rebutted. See *Dow Jones*, 917 F.2d at 576-577; *Nadler*, 955 F.2d at 1487.[16] But where, as here, the requester has introduced no evidence to refute the reasonable supposition that persons who provide information to the FBI in the course of a murder investigation do so under an implied assurance of con-

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way contradict the expectation that such information will not be made available "to any person," which is the result under the FOIA unless the information is exempt. 5 U.S.C. 552(a)(3). Moreover, as the en banc First Circuit recognized in *Irons*, 880 F.2d at 1448-1456, even public testimony by a witness cannot "waive" confidentiality under Exemption 7 as to any information beyond that actually disclosed. Accordingly, there is no merit to the argument, made by respondent below, that his *Brady* claim somehow precludes confidential treatment of the records at issue; under the FOIA, respondent has no greater right to the materials he seeks than would any other member of the public. *Reporters Committee*, 489 U.S. at 771.

[16] In *Miller*, the Seventh Circuit found that the plaintiff had successfully rebutted the presumption as to one source by producing the source's affidavit stating that she had not been led to believe that information she gave was taken on an implied promise of confidentiality. The court construed the source's affidavit as a waiver of confidentiality. See 661 F.2d at 627-628.

fidentiality, the FBI is entitled to summary judgment on its invocation of Exemption 7(D).

4. The foregoing principles properly implemented Exemption 7(D) even prior to the 1986 amendments to the FOIA, when the FBI had the burden under Exemption 7(D) of proving that disclosure "would" identify a confidential source or reveal information provided by such a source. Indeed, several of the leading cases expressly or effectively applying a presumption of confidentiality were decided prior to the 1986 amendments. See *Miller*, 661 F.2d at 627; *Ingle*, 698 F.2d at 269; *Johnson*, 739 F.2d at 1517-1518; *Diamond*, 707 F.2d at 78. Congress's substitution in 1986 of the phrase "could reasonably be expected to" disclose for "would" disclose renders that approach all the more sound. See pages 29-33, *infra*.

The court below erroneously dismissed this new language in Exemption 7(D) as irrelevant because it did not alter the *definition* of "confidential source." See Pet. App. 23a, 29a. The pivotal issue in this case is not the meaning of "confidential source" (as to which there is general agreement), but the nature of the FBI's *evidentiary burden* in an Exemption 7(D) case. The amended statutory language is highly relevant on that issue. The court of appeals itself acknowledged that the amended language concerns "the degree of risk of confidential source disclosure Congress was willing to accept," Pet. App. 29a, but failed to appreciate that it encompasses more than one kind of risk.

One form of uncertainty covered by the amended language arises where the requested information does not expressly identify the source, but "could reasonably be expected to" do so if disclosed because it contains potentially identifying clues. A different (but no less pertinent) form of uncertainty is present here. Where, as is typically the case, the FBI has information that a person provided in the course of a criminal investigation but has little or no direct evidence of the circumstances under which he did so, it nonetheless is very likely as an empirical matter (given the nature of criminal investigations generally) that the person qualifies as a "confidential source." It may be difficult in a given case to prove with a high degree of certainty that the particular source is confidential, and therefore that production of the requested records "would" disclose the identity of confidential sources or the information they provided. But under the 1986 amendments, the FBI need only show that such a consequence "could reasonably be expected." This language naturally encompasses the situation presented here, in which disclosure concededly would identify a source, and it is highly likely (even if perhaps not certain) that the source is in fact "confidential."

This Court, in *Reporters Committee*, has already recognized the relationship between the "could reasonably be expected to" language—which was inserted in 1986 into several subparts of Exemption 7—and the level of specificity needed to invoke its protection. In *Reporters Committee*, the Court considered the application of Exemption 7(C) to FBI "rap sheets." In light of the nature of the information in rap sheets—disclosure of which would invariably engender some invasion of privacy, yet would not ordinarily provide the public with any meaningful information about the conduct of the FBI—the Court concluded that a "categorical" approach was appropriate. It accordingly held that rap sheets as a class are protected by Exemption 7(C), without any need for a case-by-case analysis. 489 U.S. at 776-778. The Court found specific support for a categorical approach to Exemption 7 in the 1986 amendments, which were "intended to replace a focus on the effect of a particular disclosure 'with a standard of reasonableness . . . based on an objective test.'" *Id.* at 778 n.22 (quoting S. Rep. No. 221, 98th Cong., 1st Sess. 24 (1983)); cf. *Spannaus v. United States Dep't of Justice*, 813 F.2d 1285, 1288-1289 (4th Cir. 1987) (discussing effect of 1986 FOIA amendments on Exemption 7(A)).[11]

[11] The Court has repeatedly upheld the use of a categorical showing regarding the application of other FOIA exemptions, even

The court below believed that *Reporters Committee* is irrelevant here because it involved the Exemption 7(C) "balancing" test. Pet. App. 29a. Other courts addressing the same issue, however, have properly recognized the importance of *Reporters Committee* in confirming the propriety of categorical analyses under Exemption 7(D) as well. See *Dow Jones*, 917 F.2d at 577, 579; *Nadler*, 955 F.2d at 1486-1487 n.7. As the latter court explained, "the congressional requirement * * * of confidentiality does not prevent a categorical determination that sources in an FBI criminal investigation are presumptively confidential." *Ibid.* The court of appeals' contrary ruling, requiring individualized, source-by-source showings, is nothing other than a judicially engrafted addition to the text of the FOIA itself."

B. The FBI's Withholding Of The Documents Furthers The Consistent Intent Of Congress In Enacting And Amending Exemption 7 To Provide Firm Protection For Confidential Law Enforcement Sources

The entire history of Congress's consideration of the FOIA—from its initial enactment in 1966 through its most recent amendment in 1986—shows an abiding congressional concern that the Act's policies of open government not be permitted to endanger the effectiveness of vital law enforcement activities. The approach to Exemption 7(D) that we urge and that most lower federal courts have embraced substantially furthers that overriding purpose.

where the text of the particular exemption does not directly speak to the point. See *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 223-224 (1978) (Exemption 7(A), prior to 1986 amendments); *FTC* v. *Grolier, Inc.*, 462 U.S. 19, 27-28 (1983) (Exemption 5); *Reporters Committee*, 489 U.S. at 776-779 (discussing *Robbins Tire* and *Grolier*). *A fortiori*, a categorical approach is warranted here, because Congress in 1986 specifically eased the government's burden of proof by requiring only a showing that disclosure "could reasonably be expected to" lead to the identified harm.

[18] Compare *CIA* v. *Sims*, 471 U.S. 159, 174-177 (1985) (rejecting the D.C. Circuit's requirement that the CIA can withhold information about "intelligence sources" only if it shows that the information would have been unattainable without a promise of confidentiality).

1. *The Enactment Of The FOIA In 1966.*

In recommending passage of the FOIA in 1966, the House committee emphasized that "[i]t is vital to our way of life to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 6 (1966), *reprinted in* Subcomm. on Admin. Practice and Procedure, Senate Comm. on the Judiciary, *Freedom of Information Act Source Book: Legislative Materials, Cases, Articles* 27 (1974) [*Source Book*]. Thus, while a citizen has a right to know "how his Government is operating," he also has a "right to confide in his Government." *Ibid.*

One of the "workable standards" that Congress established to effectuate this balance was Exemption 7, which was intended to apply to all "investigatory files compiled for law enforcement purposes," including, of course, "Federal Bureau of Investigation files." See H.R. Rep. No. 1497, *supra*, at 2 (*Source Book* at 23). In fact, this Court has specifically noted Congress's recognition in 1966 that "[i]t is * * * necessary for the very operation of our Government to allow it to keep confidential certain material, such as the investigatory files of the Federal Bureau of Investigation." *FBI* v. *Abramson*, 456 U.S. 615, 631 (1982) (quoting S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965) (*Source Book* at 38)).[19]

2. *The 1974 Amendments.*

The express protection in Exemption 7(D) for "confidential sources" has its genesis in the 1974 amendments

[19] President Johnson echoed those sentiments when he signed the FOIA into law, observing that "[a] citizen must be able in confidence to complain to his Government and to provide information." *Source Book* at 195.

to the FOIA, Pub. L. No. 93-502, 88 Stat. 1561 (1974), which restructured Exemption 7 to provide that records may be withheld only if they meet a threshold test of being compiled for "law enforcement purposes" and also fall into one of several specific categories. The amendments responded in large part to certain lower court decisions that appeared to exempt virtually all law enforcement records from disclosure, and they were particularly designed to prevent use of Exemption 7 "to commingle otherwise nonexempt materials with exempt materials in a law enforcement investigatory file." *John Doe Agency*, 493 U.S. at 156. Although the amendments tailored Exemption 7 in several respects, they evince a continued purpose to protect law enforcement interests, especially in the core area FBI criminal investigations.

a. Because the 1974 amendments initially addressed other issues,[20] the revisions of Exemption 7 were offered as a floor amendment by Senator Hart. 120 Cong. Rec. 17,033-17,034 (1974) (*Source Book II* at 332-335). His version of Exemption 7(D) differed significantly from the one ultimately enacted: it referred to "informer[s]" rather than "confidential sources," and it made no provision for withholding all information furnished by a confidential source. *Id.* at 17,033 (*Source Book II* at 332). Even so, Senator Hart stated that his proposal constituted no "radical departure" from the then-existing treatment of law enforcement materials. *Id.* at 17,034 (*Source Book II* at 334).

Opponents of the amendment noted the great importance to FBI investigations of private citizens' coming forward with information, and reminded the Senate that it is the normal practice of the FBI to treat information

[20] See, *e.g.*, S. Rep. No. 854, 93d Cong., 2d Sess. (1974), *reprinted* in Comm. on the Judiciary, United States Senate, *Freedom of Information Act and Amendments of 1974 (P.L. 93-502) Source Book: Legislative History, Texts, and Other Documents* 153-215 (1975) (*Source Book II*).

received in this manner as confidential. See 120 Cong. Rec. 17,036, 17,038 (1974) (Sen. Hruska) (*Source Book II* at 340, 348). Senator Thurmond stated:

> The FBI has always staked its high reputation on the fact that information given to it in confidence is kept secret. It is just such assurance as this that encourages individuals from all walks of life to furnish this agency information * * *.

Id. at 17,037 (*Source Book II* at 343). The proponents did not dispute the importance of citizen cooperation and the tradition of FBI confidentiality; they instead insisted that the amendment would not adversely affect those interests. The amendment's thrust, Senator Kennedy explained, was that the FOIA should be "specific about safeguarding * * * the investigative files of the FBI." *Id.* at 17,039 (*Source Book II* at 349). Senator Hart responded to the concerns in a similar manner:

> The Bureau stresses the need for confidentiality in its investigations. I agree completely. All of us recognize the crucial law enforcement role of the Bureau's unparalleled investigating capabilities.
>
> However, my amendment would not hinder the Bureau's performance in any way. * * * [The amendment] was carefully drawn to preserve every conceivable reason the Bureau might have for resisting disclosure of material in an investigative file.

Id. at 17,040 (*Source Book II* at 351). Senator Hart also stressed that "[i]f informants' anonymity—whether paid informers or citizen volunteers—would be threatened, there would be no disclosures." *Ibid.*

b. Although the Senate passed the floor amendment, 120 Cong. Rec. 17,040 (1974) (*Source Book II* at 351-352), the conference committee, at the request of President Ford, reopened discussion on several key points, including President Ford's concerns about the possible effects of the Exemption 7 amendments on the FBI. See Letters between President Ford and Senator Kennedy (Aug. 20 and Sept. 23, 1974) (*Source Book II* at 368-372). To

meet the President's concerns, the committee made "major changes." 120 Cong. Rec. 36,871 (1974) (Sen. Hart) (*Source Book II* at 451). One such change was that, in addition to protecting the identity of confidential sources, Exemption 7(D) would protect *all* information provided by such sources in criminal and national security investigations. Explaining the modest burden that the FBI would have under this provision, Senator Hart stated that "all the FBI has to do is to state that the information was furnished by a confidential source and it is exempt." *Ibid.* The conference committee also substituted "confidential source" for "informer," and explained that this change was being made—

> to make clear that the identity of a person other than a paid informer may be protected if the person provided information under an express assurance of confidentiality *or in circumstances from which such an assurance could be reasonably inferred.*

H.R. Conf. Rep. No. 1380, *supra*, at 12 (*Source Book II* at 230) (emphasis added).

c. The rule we urge—recognizing the confidentiality that is inherent whenever an individual furnishes information to the FBI in a criminal investigation—meets the concerns expressed throughout the consideration of Exemption 7(D) in 1974. Indeed, lower courts adopting this rule have relied extensively on the legislative history of the 1974 amendments. See, *e.g.*, *Nadler*, 955 F.2d at 1485; *Miller*, 661 F.2d at 626-627.[21] For even as Congress narrowed Exemption 7 in certain respects, it reaffirmed its commitment to strike a workable balance between openness in government and the need for confidentiality in criminal law enforcement.

[21] Sponsors consistently gave assurances that the amendments contained "safeguards" for law enforcement activities and denied any intention to impede the FBI's ability to protect sources by imposing unrealistic burdens. See 120 Cong. Rec. 36,629 (Rep. Erlenborn) (*Source Book II* at 420-421); *id.* at 17,040, 36,629 36,866-36,867, 36,871 (Sens. Kennedy & Hart) (*Source Book II* at 350, 351, 420-421, 440, 450-451); *id.* at 36,623 (Rep. Moorhead) (*Source Book II* at 406); see also *Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act* 10 (1975) (*Source Book II* at 520) ("In most circumstances, it would be proper to withhold the name, address and other identifying information of a citizen who submits a complaint or report indicating a possible violation of law.").

3. *The 1986 Amendments.*

The 1986 amendments to the FOIA[22] further underscore the propriety of employing a presumption of confidentiality for sources who furnish information in the course of criminal investigations. Contrary to the court of appeals' belief that those amendments were passed "with almost no legislative background," Pet. App. 23a, they in fact followed several years of extensive consideration of the adverse effects that the FOIA was having on law enforcement activities. See *e.g.*, *Abramson*, 456 U.S. at 628-629 n.12.

a. In 1979, FBI Director Webster testified before Congress about law enforcement difficulties engendered by the FOIA. Pointing to the escalating use of the FOIA by prisoners and organized-crime figures as a means of identifying individuals cooperating with the FBI, he stated that the fear of disclosure under the FOIA was deterring potential sources—including "private citizens, businessmen, and officials of municipal, state, Federal and even foreign governments"—from coming forward with valuable information.[23] In the following two years,

[22] The Freedom of Information Reform Act of 1986 was enacted as §§ 1801-1804 of the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-48 to 3207-51. See generally *Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act* (1987).

[23] See *FBI Oversight: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. 97, 99-100, 106 (1980). Earlier law enforcement

both the Carter and Reagan Administrations drafted legislative proposals to address these and other FOIA concerns. Those proposals incorporated a number of elements, including an amendment to Exemption 7(D) to permit withholding of information that would "tend to" identify confidential sources or release information provided by such sources.[24]

In presenting the Administration's proposal in 1981, Assistant Attorney General Rose brought to Congress's attention the very decision (*Lame*) in which the Third Circuit first announced the rule it reaffirmed in the instant case. *1981 Hearings* at 630-631. Although the court held in *Lame* that Exemption 7(D) required "detailed explanations relating to each confidential source," it expressed substantial qualms about the practical ramifications of that requirement (including deterrence of cooperation and undue burden on the FBI and the courts), and specifically commended the subject to Congress's consideration. See 654 F.2d at 929. By virtue of extensive hearings in the early 1980s,[25] Congress was thoroughly informed of the gravity of these problems, especially the unwillingness of sources to come forward with information due to fears of disclosure under the

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reports of difficulties engendered by the FOIA are discussed in *Impact of the Freedom of Information and Privacy Acts on Law Enforcement Agencies*, GAO Rep. No. GGD-78-108 (1978).

[24] See *Freedom of Information Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 178-185, 630-633, 638-653 (1981) [*1981 Hearings*].

[25] See *1981 Hearings*, *supra*; *Freedom of Information Act: Hearings on S. 774 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. (1983) [*1983 Hearings*]; *Freedom of Information Act: Hearings on S. 774 Before a Subcomm. of the House Comm. on Government Operations*, 98th Cong., 2d Sess. (1984) [*1984 Hearings*].

FOIA.[26] The FBI presented a listing of more than 200 instances of source problems related to the FOIA, including specific examples of sources who were compromised as a result of FOIA disclosures or potential sources who were unwilling to cooperate fully. *1981 Hearings* at 990-1040; *1983 Hearings* at 62-93; see also *1981 Hearings* at 1041-1147 (DEA study of adverse effects of the FOIA on its enforcement efforts).

As the various witnesses pointed out, the problem was in part one of public perception that the FBI could not protect confidential sources in light of the FOIA. *1981 Hearings* at 161 (AAG Rose); *1983 Hearings* at 480-492 (Dir. Webster). The perceived dangers had foundation, moreover, in the fact that a substantial and growing percentage of FOIA requests processed by the FBI, DEA, and other law enforcement agencies were submitted by prisoners, organized-crime figures, and other known or suspected criminals. *1981 Hearings* at 161 (AAG Rose); *1983 Hearings* at 28 (AAG Rose); *id.* at 478, 491-492 (Dir. Webster); *1984 Hearings* at 812 (Dir. Webster); see *Abramson*, 456 U.S. at 628 n.12. Accordingly, as Director Webster pointed out, one of the greatest needs in any revision of the FOIA was to provide "firmer, clearly set parameters," in order "to reassure our sources that their cooperation will remain confidential." *1981 Hearings* at 854; *1984 Hearings* at 812.

Although Congress was considering a number of provisions to address these problems, a key feature at all times was an amendment to Exemption 7(D) to replace

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[26] See *1981 Hearings* at 474-475, 481 (Secret Service Director Burke); *id.* at 487-488 (memorandum on effect of FOIA on informants); *id.* at 553-558 (report by Federal Criminal Investigators Ass'n); *id.* at 663 (AAG Rose); *id.* at 854-861, 975-980 (Dir. Webster); *1983 Hearings* at 28-29 (AAG Rose); 432-478 (reproducing 1981 memorandum on effect of FOIA on FBI); *id.* at 479-480 (Dir. Webster); *1984 Hearings* at 771-772 (DAG Dinkins); *id.* at 811-813 (Dir. Webster).

its test of whether release "would" disclose a confidential source or source information with a standard that would be easier to satisfy—initially "would tend to" disclose, and later "could reasonably be expected to" disclose, such matters. FBI Director Webster termed this "the most important section of [the] bill." *1983 Hearings* at 499; see also *1984 Hearings* at 783 (DAG Dinkins).

b. In 1984, the Senate approved a bill, S. 774, which incorporated this and other amendments to the FOIA. See 130 Cong. Rec. 3492-3521 (1984). Although the House of Representatives took no action on S. 774 in the 98th Congress, that bill and the Senate committee report recommending its passage have been recognized as the most authoritative legislative history of the 1986 amendments, which incorporated several features of S. 774 and were approved as a floor amendment and enacted into law as part of a broader crime bill in the 99th Congress. See 132 Cong. Rec. 27,189 (1986) (Sen. Leahy); *Reporters Committee*, 489 U.S. at 778 n.22; *King* v. *Department of Justice*, 830 F.2d 210, 229 n.141 (D.C. Cir. 1987).

The Senate Report concluded that difficulties in invoking Exemption 7(D) had "harmed the ability of law enforcement officers to enlist informants and carry out confidential investigations," and had "slowed the flow of confidential information to the law enforcement community." S. Rep. No. 221, 98th Cong., 1st Sess. 2 (1983). In particular, the Report discussed the relationship of the "could reasonably be expected to" language to law enforcement agencies' "burden of proof" in invoking Exemption 7(D). *Id.* at 23-24. It recognized that the burden arguably imposed by the existing "would" standard had "substantially contribut[ed] to the asserted 'perception' problem of sources doubting the FBI's ability to protect their identities from disclosure," and it explained that the "could reasonably be expected to" standard "recognizes the lack of certainty in attempting to predict harm" and provides an "objective test" for application of Exemption

7(D). *Id.* at 24; see also 132 Cong. Rec. 26,768-26,770, 31,424 (1986) (Sen. Hatch); *id.* at 27,189 (Sen. Leahy); *id.* at 27,191-27,192 (Congressional Research Service memorandum); *1986 Attorney General's Memorandum* at 9-13.

c. As this background shows, the 1986 amendments were specifically intended to "broaden the reach of [Exemption 7] and to ease considerably a Federal law enforcement agency's burden in invoking it." *Irons*, 880 F.2d at 1452; see *Reporters Committee*, 489 U.S. at 756 n.9, 777-778 n.22; 132 Cong. Rec. 31,424 (1986) (Sen. Hatch).[27] By providing that the government need only show that release of requested records "could reasonably be expected to" identify a confidential source or reveal information provided by such a source, Congress recognized the uncertainties inherent in *post hoc* assessments of law enforcement files and sought to protect sources even when the dangers are potential rather than proven with certainty. The rule we urge for Exemption 7(D) cases—which rests on a reasonable inference or presumption of confidentiality arising from the traditional practices of the FBI and the normal expectations of citizens—gives effect to the central purposes of Exemption 7(D) and the findings on which Congress acted in 1986.

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[27] In addition to amending Exemption 7, the 1986 amendments also added special "exclusions" that provide even greater protection for certain types of records, including "informant" records when requested according to the informant's name. See Pub. L. No. 99-570, § 1802(b), 100 Stat. 3207-48 codified at 5 U.S.C. 552(c)(2). In light of the manner in which respondent's FOIA requests were made, that exclusion is not at issue here. Nonetheless, Congress's decision to provide this added protection for informants further underscores its strong commitment to respect the legitimate confidentiality needs of federal law enforcement agencies. See generally S. Rep. No. 98-221, *supra*, at 25; *1986 Attorney General's Memorandum* at 22-24.

C. Practical Considerations Strongly Favor The Use Of Realistic Inferences In Sustaining The Application Of Exemption 7(D)

"This Court consistently has taken a practical approach when it has been confronted with an issue of interpretation of [the FOIA]." *John Doe Agency*, 493 U.S. at 157. The development of "concrete, workable standards for determining whether particular material may be withheld" under the FOIA is not only a matter of sound judicial administration; it also furthers the intent of Congress. *EPA* v. *Mink*, 410 U.S. 73, 79 (1973); see S. Rep. No. 813, *supra*, at 3 (*Source Book* at 38) (expressing intent to provide "a workable formula which encompasses, balances, and protects all interests"). Like all statutes, moreover, FOIA must be applied in a manner "most harmonious with its scheme and with the general purposes that Congress manifested." *Abramson*, 456 U.S. at 625 n.7. In particular, the Court has recognized that while FOIA's dominant policy is disclosure, "the statutory exemptions are intended to have meaningful reach and application." *John Doe Agency*, 493 U.S. at 152. As shown by the legislative development of Exemption 7(D) described in Point B, *supra*, Congress has consistently intended that provision to be applied in a meaningful and realistic manner, in order to protect the confidential sources upon which the FBI and other law enforcement agencies depend.

In order for FOIA to serve the purposes Congress intended, the courts must apply "workable rules" not only with respect to the substantive scope of the FOIA exemptions, but also the nature of the government's burden of proof and the level of specificity at which an agency may establish the applicability of a particular exemption. See *Reporters Committee*, 489 U.S. at 777-778 n.22, 779; *Grolier*, 462 U.S. at 27-28; *Robbins Tire*, 437 U.S. at 223-224. The court below lost sight of this goal, and adopted a rule that would impose needless burdens on both law

enforcement agencies and the courts and frequently make it impossible, as a practical matter, for the FBI and other law enforcement agencies to protect legitimate confidential sources. The court's approach would prevent Exemption 7(D) from serving the purpose of reassuring potential sources that they may safely entrust information to the FBI, and could ultimately have drastic repercussions on the FBI's ability to perform its vital functions.

As the court of appeals acknowledged in *Lame*, when it first insisted upon source-specific factual showings in order for the FBI to invoke Exemption 7(D), the consequence would be to require the FBI "to expend sorely needed resources, not to deal with the burgeoning problem of crime which seriously besets all our citizens, but to devote a large number of hours of exacting labor sorting out affidavits." 654 F.2d at 929.[28] Indeed, the practical burdens that the court of appeals' rule would engender are awesome. The FBI responds to many thousands of FOIA requests each year,[29] and requests such as the present one may cover large numbers of separate sources. While the existence of such a practical burden would not be a reason to avoid

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[28] One judge on the *Lame* panel was more direct, observing that the FBI "should be permitted to fight crime * * * rather than to serve as a librarian to furnish criminals a complete account of the evidence in the government's possession demonstrating their criminality, or to conduct historical research for the benefit of journalists seeking to spread the slime of scandal and sensationalism throughout the land for monetary gain." 654 F.2d at 932 (Dumbauld, J., concurring and dissenting).

[29] In 1983 testimony, for example, FBI Director Webster stated that the FBI had responded to more than 100,000 requests since enactment of the 1974 FOIA amendments, and processed more than one million pages of documents in 1982 alone. *1983 Hearings* at 480. The FBI continues to receive access requests at the rate of approximately 20,000 to 25,000 per year. See U.S. Dep't of Justice, *Annual Report on Freedom of Information Activities* 2, 23 (May 1, 1992); U.S. Dep't of Justice, *Annual Report on Freedom of Information Activities* 2, 24 (Apr. 25, 1991).

an obligation unequivocally imposed by Congress, we have already shown that there is no support in either the text or the legislative history of the FOIA for the insistence by the court below that the FBI justify its invocation of Exemption 7(D) by individualized factual showings, rather than by reasonable inferences regarding various categories of FBI sources. Indeed the whole thrust of Exemption 7(D) is to the contrary.

More importantly, the burden imposed by the court below extends beyond the diversion of resources. As other courts of appeals have recognized, requiring source-by-source factual showings imposes an enormous "practical difficulty—if not impossibility" for the invocation of Exemption 7(D). *Diamond*, 707 F.2d at 78; see *Donovan*, 806 F.2d at 61; *Nadler*, 955 F.2d at 1485-1486. The present case illustrates this difficulty, because the records respondent seeks are for the most part 15 years old. Even if the FBI agents who received information from sources in the investigation of the murder of Officer Snow were still available and could be located, it is highly unlikely that they would be able to swear, from memory, to the circumstances of interviews that occurred so long ago.[30] Furthermore, records of witness interviews typically provide little detail about the conduct of the interview; they merely set forth the substantive information the FBI must have to get its work done. Accordingly, an artificial requirement of "detailed explanations relating to each alleged confidential source," Pet. App. 27a, is a recipe for precluding the protection of confidential sources in many instances. Such an approach therefore fails to give "meaningful reach and application" to Exemption 7(D). *Nadler*, 955 F.2d at 1485 (quoting *John Doe Agency*, 493 U.S. at 152).

[30] In other cases, Exemption 7(D) has been applied to records far older than in the present case. See, *e.g.*, *Schmerler*, 900 F.2d at 336 (upholding application of Exemption 7(D) to records over 50 years old). In such cases, the passage of time "virtually precludes any hope of meaningful affidavits from interview participants." *Keys* v. *United States Dep't of Justice*, 830 F.2d at 345.

By ignoring the "virtues of bright-line rules," *Reporters Committee*, 489 U.S. at 780, the decision below also imposes on the federal courts the massive and unwieldy burden of evaluating the circumstances of individual law enforcement encounters to ascertain whether they connote confidentiality. See *Lame*, 654 F.2d at 929. Here again, the problem is not simply one of resource allocation, but of the effect as well on the policies that Congress sought to further. Because of the difficulties the courts would necessarily face in second-guessing the precise circumstances of long-past interviews (to the extent they could be established), the procedure envisioned by the court below would "result in *ad hoc*—and therefore unprincipled—determinations" by the courts. See *Dow Jones*, 917 F.2d at 577. Not only are such determinations likely to be of dubious reliability, but, more importantly, the unpredictability of such a decisionmaking process would leave potential sources of law enforcement information with no solid assurance that the information they confide to federal law enforcement agents will not be made publicly available under the FOIA. That is precisely the consequence that Congress sought to prevent when it passed the 1986 FOIA amendments, based on extensive testimony by federal law enforcement officials about the public perception that the FOIA was thwarting the protection of confidential sources.[31]

[31] In an analogous context, this Court expressed "serious[] doubt[s] whether a potential intelligence source will rest assured knowing that judges, who have little or no background in the delicate business of intelligence gathering, will order his identity revealed only after examining the facts of the case to determine whether the Agency actually needed to promise confidentiality in order to obtain the information." *CIA* v. *Sims*, 471 U.S. 159, 176 (1985). Whether the question concerns the circumstances justifying a promise of confidentiality in an intelligence matter or the circumstances justifying an inference of confidentiality in a criminal

The chilling effect that such uncertainty would have on potential sources of law enforcement information would attack the very heart of the protection Congress sought to provide in Exemption 7(D) and, in so doing, disrupt the flow of information upon which the FBI and other federal law enforcement agencies rely. See *Abramson*, 456 U.S. at 628 n.12; compare *United States* v. *Weber Aircraft Corp.*, 465 U.S. 792, 803 & n.23 (1984). As the majority of the lower federal courts have recognized, a presumption of confidentiality for such sources "is necessary not only to protect the individual interviewees, but also to insure the continuing efficacy of FBI criminal investigation." *Miller*, 661 F.2d at 627; see *Hale*, 973 F.2d at 899; *Nadler*, 955 F.2d at 1486; *Keys*, 830 F.2d at 345.

D. Reliance On A Presumption Of Confidentiality For Sources Of Information In FBI Criminal Investigations Is Consistent With The FOIA's Allocation Of The Burden Of Proof And With The Role Of Presumptions In Our Legal System

Despite the support in both the text and purposes of Exemption 7(D) for our position that confidentiality is "inherently implicit" in FBI criminal investigations, respondent argued below that any "presumption" of confidentiality is contrary to the FBI's burden under the FOIA of sustaining its withholding decisions. See Pet. App. 23a; Br. in Opp. 6-7; see also *Dow Jones*, 917 F.2d at 577-578 (Edwards, J., concurring in panel decision and dissenting from denial of rehearing en banc). The court below declined to address the FBI's reliance on Exemption 7(D) in terms of a "presumption," instead viewing the issue as "what constitutes a *prima facie* case of 'confidential source.'" Pet. App. 24a; see *id.* at 23a-25a. At bottom,

matter, "[t]here is no reason for a potential * * * source, whose welfare and safety may be at stake, to have great confidence in the ability of judges to make these judgments correctly." *Ibid.*

there is no real difference between the "prima facie case" approach that the court below considered (but rejected because of its prior ruling in *Lame*) and the "presumption" approach employed by other circuits. See *Dow Jones*, 917 F.2d at 576-577; *Nadler*, 955 F.2d at 1486. The rule the FBI seeks does not shift the ultimate burden of proof, and it therefore is in no way inconsistent with the FOIA's allocation of that burden. Moreover, like presumptions recognized in many areas of civil litigation, it reflects a realistic accommodation of probabilities and unavoidable evidentiary difficulties, and is amply justified in light of the underlying statutory policies.

1. The FOIA places upon a federal agency defending the withholding of records "the burden * * * to sustain its action." 5 U.S.C. 552(a)(4)(B). Neither the statute nor its legislative history elaborates upon this burden, and there accordingly is no reason to believe that Congress intended any higher standard than that prevalent in civil litigation in the federal courts generally—*i.e.*, proof by a preponderance of the evidence.[22] See 2 *McCormick on Evidence* § 339, at 437-441 (4th ed. 1992). As the court below recognized, the question is whether a given quantum of evidence "is enough to permit a rational inference" that it is "more likely than not" that the records at issue fall within one of the FOIA exemptions. See Pet. App. 24a;[23] compare *Leary* v.

[22] See, *e.g.*, H.R. Rep. No. 1497, *supra*, at 9 (*Source Book* at 50); S. Rep. No. 813, *supra*, at 8 (*Source Book* at 43). An earlier version of the bill expressly specified a preponderance of the evidence standard (see S. Rep. No. 1219, 88th Cong., 2d Sess. 14-17 (1964) (*Source Book* at 99-102)), but the legislative history does not suggest that omission of that phrase from the law as enacted was intended to alter the normal standard.

[23] The court of appeals' formulation, however, was only partially correct. Although the court properly invoked the "more likely than not" standard, it lost sight of the precise issue to which that evidentiary standard must be applied. The court appears to have believed that the FBI's burden is to show by a preponderance of

United States, 395 U.S. 6, 32-36 (1969). The rule that we urge and that most courts of appeals have adopted rests on no more than a straightforward application of this standard of proof.

Once the FBI has shown by affidavit or declaration that a particular law enforcement record identifies an outside source who provided information to the FBI during the course of a criminal investigation (or contains information provided by such a source), that fact is sufficient in itself to support a rational inference that, more likely than not, the conditions of Exemption 7(D) are met. As discussed above, both common sense and the FBI's long tradition of confidential treatment of sources—as well as the legislative record on which Congress acted in 1986—make it eminently reasonable to infer from such a showing (in the absence of any evidence to the contrary) that release of the information at issue "could reasonably be expected to" identify a source who expected confidentiality.

Where, as here, a particular inference will characteristically be well grounded in a certain class of cases, the courts have frequently found it appropriate to employ presumptions, in which proof of one fact establishes the existence of another, in the absence of evidence rebutting the presumption. The use of such presumptions is a long-established part of civil litigation, in cases arising both at common law and under federal statutes. See generally *McCormick on Evidence*, *supra*, §§ 342-343, at 449-460. Although Congress sometimes provides express presumptions, see, *e.g.*, *Leary* v. *United States*, *supra*, this Court has also recognized the propriety of their use

the evidence that the source in question is a confidential source. Under the 1986 FOIA amendments, however, the FBI need only show by a preponderance of the evidence—*i.e.*, that it is more likely than not—that disclosure of the records "could reasonably be expected to" reveal such a source or information provided by such a source.

in litigation under a variety of other federal statutory schemes that do not expressly so provide. See *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 253-256 (1981) (Title VII); *Basic Inc.* v. *Levinson*, 485 U.S. 224, 245-247 (1988) (reliance on market price in "fraud on the market" securities claims); *Kungys* v. *United States*, 485 U.S. 759, 776-777 (1988) (plurality opinion) (materiality of misrepresentations in connection with naturalization proceedings).

As the discussion in the preceding sections of this brief demonstrates, the major factors that bear upon the appropriateness of a presumption—"fairness, public policy, and probability," *Basic Inc.*, 485 U.S. at 245—all point to the acceptance of the presumption of confidentiality here. See also *McCormick on Evidence* § 343, at 454-460; 1 D. Louisell & C. Mueller, *Federal Evidence* § 68, at 546-550 (1977). First and foremost, "common sense and probability," *Basic Inc.*, 485 U.S. at 245, support the proposition that persons providing information to the FBI in the course of a criminal investigation ordinarily have every reason to expect confidentiality. See pages 17-20, *supra*. Second, this is a situation in which "direct proof * * * is rendered difficult." *Ibid.* As we have explained, the passage of time and the limited documentation typically available will frequently make it "difficult[]—if not impossibl[e]" for the FBI to produce any evidence about the particular circumstances of an individual source.[*] See *Donovan*, 806 F.2d at 61. Finally, a presumption of

[*] The fact that a FOIA plaintiff may have even less ability to address the circumstances of a particular source is no reason not to employ a presumption. Since *neither* party is likely to have such information, and the probabilities so strongly favor confidentiality, use of the presumption is warranted. This result furthers the purpose of Exemption 7(D) by furthering both the reality and the perception that the FBI will be able to protect the confidentiality of sources in the absence of an affirmative showing that confidentiality was not intended in the particular instance.

confidentiality "is consistent with, and * * * supports, the congressional policy embodied in" Exemption 7(D). *Basic Inc.*, 485 U.S. at 245. For reasons already addressed, recognition of such a presumption is vital to the statutory purpose of assuring potential sources that they can confide in the FBI, and thereby to safeguard the flow of law enforcement information to the FBI.[55]

2. Recognition of such a presumption, moreover, would not improperly shift the burden of proof under the FOIA. On the contrary, the Federal Rules of Evidence eschew a burden-shifting approach to the use of presumptions in federal civil litigation. Rule 301 provides that

> a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

See generally 1 Louisell & Mueller, *supra*, § 65, at 518-525; *Burdine*, 450 U.S. at 253-256.

Recognition of a presumption of confidentiality in the present context would similarly not shift the ultimate burden of persuasion, which would remain at all times on the federal agency invoking Exemption 7(D). Moreover, "[f]ixing the burden of proof on a party is plainly not inconsistent with a substantive rule identifying specific facts that will carry the burden." *Dow Jones*, 917 F.2d at 579 (Silberman, J., concurring in denial of rehearing en banc). In an Exemption 7(D) case, the FBI fully meets its initial burden by demonstrating that release of the records in question could reasonably be expected to disclose the identity of (or information provided by) a source who furnished information to the FBI in the course of a criminal investigation. Once the FBI has made this prima facie showing, judgment must be entered in its favor unless the plaintiff comes forward with "solid evidence" that the source did not desire confidential treatment. *Dow Jones*, 917 F.2d at 577; see *Burdine*, 450 U.S. at 254.[56]

[55] A presumption also serves the goal of "judicial economy." *Basic Inc.*, 485 U.S. at 245, by avoiding a time-consuming judicial inquiry into the details of each source's cooperation with the FBI.

This approach, based upon a presumption (or inference) of confidentiality, closely parallels the "categorical" approach adopted in *Reporters Committee*, where the Court recognized that application of a clear and workable rule to a class of cases is often appropriate in order to effectuate the policies of the FOIA. 489 U.S. at 776-780 & n.22; see *Dow Jones*, 917 F.2d at 577, 579. In the present context, such a rule is essential to achieve the protection of confidential sources that Congress intended, and to preserve the flow of information upon which the FBI and other law enforcement agencies depend on a daily basis for their vital work.

[56] The courts have recognized that the substance of the information the source provided cannot serve to rebut the presumption, because the fact of a source's cooperation with the FBI will normally be a confidential matter even if the underlying facts are publicly known in some sense. See *Dow Jones*, 917 F.2d at 576; *Schmerler*, 900 F.2d at 338; *Shaw*, 749 F.2d at 61-62. Moreover, where the plaintiff presents rebuttal evidence, the normal inferences of confidentiality do not vanish. Rather, the trier of fact must take them into account, along with all of the other available evidence, in ascertaining whether the government has nevertheless met its burden of establishing the applicability of Exemption 7(D) by a preponderance of the evidence. Cf. *Burdine*, 450 U.S. at 255 n.10.

CONCLUSION

The judgment of the court of appeals should be reversed insofar as it requires disclosure of information the FBI withheld under FOIA Exemption 7(D), and the case should be remanded with directions to enter judgment in favor of the FBI as to that information.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

LEONARD SCHAITMAN
JOHN F. DALY
Attorneys

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